Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

LEANNA C. BLANKENSHIP,

Petitioner,

vs.

PARKE CARE CENTERS, INC., and WESTCHESTER MANAGEMENT COMPANY, doing business as BARBARA PARKE CONVALESCENT CENTER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts properly applied the well-established requirement of "prompt and appropriate corrective action" to the particular facts of this case.

PARTIES TO THE PROCEEDING

Respondent Westchester Management Company is a wholly owned subsidiary of respondent Parke Care Centers, Inc. Parke Care Centers, Inc. has three other wholly owned subsidiaries: Parke Care of Silverton, Parke Care of Westwood, and Parke Care of Finneytown. The entire group is privately held. Neither respondent has any other parent companies or nonwholly owned subsidiaries.

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This case does not implicate any circuit split. Indeed, the petitioner herself concedes that federal courts of appeal have been "almost unanimous" on the question that she addresses. Pet. 11. Although the petitioner claims that the decision under review disrupts this unanimity, she reaches this conclusion only by misinterpreting the opinions below. The respondents respectfully submit that her petition should be denied.

OPINIONS BELOW

The District Court's opinion is reported at 913 F. Supp. 1045 (S.D. Ohio 1996). The Sixth Circuit's opinion is reported at 123 F.3d 868 (6th Cir. 1997).

COUNTERSTATEMENT OF THE CASE

Respondent Westchester Management Company, a wholly owned subsidiary of respondent Parke Care Centers, Inc., operates the Barbara Parke Nursing Home in Middletown, Ohio. On September 13, 1993, petitioner Leanna Blankenship started work at the nursing home as a student dietary aide. Pet. App. A3. At her orientation session, Alice Kalota — the administrator in charge of the nursing home — reviewed with Blankenship the nursing home's handbook, which includes the nursing home's prohibition against sexual harassment. *See* Sixth Cir. Joint Appendix ("C.A. App.") 356-57, 501-02.

On Sunday, October 3, 1993, Blankenship complained to her supervisor, Jacquelyn Sullivan, that a janitor named Walter Malcom had "c[o]me up and hugged me and kissed me twice." *Id.* at 303. Sullivan immediately called Lisa Morgan, the charge nurse responsible for the facility over the weekend. *Id.* at 549-50, 555-57. Morgan told Sullivan to ask Blankenship to put her allegations in writing. *Id.* at 557. Sullivan also called Malcom's supervisor, Mamie Lee, on that same day, which was Lee's day off. *Id.* at 456-57. Lee came to the nursing home and monitored

Malcom's work that day; although Lee did not observe any inappropriate behavior, she immediately moved Malcom's work station to the lower level of the nursing home in order to minimize his contact with Blankenship. *Id.* at 460-67. Similarly, Sullivan moved Blankenship into the kitchen to minimize her contact with Malcom and to help Sullivan keep a protective eye on her. *See id.* at 557, 387. Sullivan also escorted Blankenship to her car after work in order to protect her. *See id.* at 312.

The following day, October 4, Blankenship gave Sullivan the requested written statement. In contrast to the oral statement that Blankenship had given Sullivan the day before, the written statement alleged that Malcom had hugged Blankenship and kissed her on the cheek on three separate occasions; that Malcom had tried to tickle her on another occasion; and that on another occasion Malcom had kissed her on the cheek and had suggested that he was falling in love with her. *Id.* at 346-47.

Management of the nursing home believed that it could not properly or fairly discipline Malcom based solely upon Blankenship's uncorroborated account.[1] Instead, management used interviews and surveillance to investigate the situation. Sullivan interviewed all members of the dietary staff who might have witnessed the alleged misconduct, but none of them could confirm Blankenship's allegation. *See id.* at 554-59. Judith Fadden, the director of nursing, instructed Sullivan to keep a close eye on Blankenship, *id.* at 561, while Lee came into the nursing home at odd hours on various days to observe Malcom. *Id.* at 387. Sullivan told Blankenship that an investigation was under way and that the problem would be addressed. *Id.* at 561. Blankenship appeared to be comforted by this response. *Id.* at 562.

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1. Had the nursing home disciplined or discharged Malcom without further evidence, it could well have been inviting a race-discrimination claim from Malcom, who was African-American. Pet. App. A38, A12.

Lee, Sullivan, Kalota, Fadden, and the charge nurses all were informed of Blankenship's allegations. In an effort to confirm those allegations, they began a surveillance network to watch both Malcom and Blankenship. *See id.* at 413-14. In addition, each day that Blankenship and Sullivan worked after the initial complaint, Sullivan asked Blankenship whether Malcom was causing any trouble. *Id.* at 312, 563. According to Sullivan, Blankenship reported no problems with Malcom from October 4 until October 17. *Id.* at 563.[2]

Blankenship did not work from October 13 through October 16. On Sunday, October 17, she submitted a second written complaint to Sullivan asserting that on October 12, Malcom had asked her out for a date. Blankenship's note stated: "I'm afraid because of what happened before and I'm afraid that he will keep on touching me and bothering me like he did before." *Id.* at 348. Sullivan promptly gave the note to her supervisor, Director of Nursing Fadden. *Id.* at 564-65. On October 18, a former employee named Amy Marshall complained that Malcom

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2. Blankenship indicates that some time around October 10 or 11, Malcom came up behind her and grabbed her breasts. Pet. 3. Blankenship also claims that she reported this incident to Sullivan. *Id.* In her first deposition, Blankenship testified that she could not remember when this alleged incident occurred. *See* C.A. App. 316. After conferring with counsel, Blankenship placed it after the October 4 written statement. *Id.* at 318. In the course of reviewing the deposition transcript, however, Blankenship changed her answer to place the incident on October 2 — two days *before* the written statement, which makes no mention of the incident. *Id.* at 350. In her second deposition, Blankenship retracted this correction and testified that the alleged incident occurred some time between October 5 and October 17. *Id.* at 362-65. But the written statement that Blankenship submitted on October 17 also makes no mention of the incident. In sum, Blankenship has placed this single alleged incident at three separate times, and she failed to include it in any of her written reports. The nursing home denies that the incident occurred at all or that Blankenship reported it to Sullivan.

had paid inappropriate attention to her. *Id.* at 521-22. That same day, October 18, Fadden and Kalota interviewed Malcom. *Id.* at 376-77. Malcom denied that he had done any of the things of which he had been accused, and he specifically denied harassing Blankenship or Marshall. *Id.* at 377, 419-20. Nevertheless, the nursing home issued Malcom a written disciplinary warning stating that "[h]arassment of any kind by an employee to another employee absolutely will not be tolerated." The disciplinary warning added that "[a]ny further occurrence will result in your immediate termination." *Id.* at 406. By giving Malcom this warning, the nursing home was imposing "level 2" of its "four levels of disciplinary action." *Id.* at 501.

It is undisputed that following this disciplinary warning, Blankenship never reported another sexual word or act by Malcom. Indeed, Sullivan questioned Blankenship each working day after October 17 to make sure that Blankenship was not being harassed, and Blankenship reported no further problems. *Id.* at 312, 331, 575. But on October 22, Blankenship became upset at work because Malcom was "around" her. Pet. App. A5. Although Blankenship did not report that Malcom was doing anything of an inappropriate nature, Sullivan gave Blankenship permission to leave early, and Blankenship's mother came to pick her up. *Id.* When she arrived, Blankenship's mother complained loudly about Malcom to administrator Kalota within earshot of the aged and infirm residents of the nursing home. C.A. App. 429-30. Kalota, Fadden, and Sullivan then met with Blankenship. Pet. App. A5. Blankenship said that Malcom had done nothing improper to her since October 12, when he had allegedly asked her for a date. Pet. App. A5. Blankenship mentioned only that Malcom was "around" her and that she did not want to be near him. Kalota told Blankenship that she could not guarantee that Blankenship could work without ever seeing Malcom. *Id.* Blankenship then chose to resign. *Id.*

On August 5, 1994, Blankenship filed a complaint against the respondents, alleging various state-law torts as well as violations of Title VII. Blankenship did not claim that she had been constructively discharged, Pet. App. A11, and she made clear during discovery that she was not seeking back pay. Instead, she alleged only that she had suffered emotional distress as a result of Malcom's alleged harassment and that the nursing home was liable for these damages. C.A. App. 76.

Judge Sandra Beckwith of the United States District Court for the Southern District of Ohio expressed doubt that Malcom's conduct had been "sufficiently severe or pervasive to alter the conditions of [Blankenship's] environment and create an abusive working environment." *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); Pet. App. A30, A40. But Judge Beckwith held that in any event, there was no genuine issue of fact about the respondents' liability for Malcom's alleged misconduct. Because the respondents had implemented "prompt and appropriate" corrective action in response to Blankenship's complaints, they were not liable under Title VII. *Id.* at A39. The District Court therefore entered summary judgment for the respondents, and the Sixth Circuit affirmed.

REASONS FOR DENYING THE WRIT

It is undisputed that Malcom, a janitor, had no supervisory power over Blankenship, and Blankenship did not allege *quid pro quo* harassment. Rather, Blankenship alleged that Malcom, a co-worker, created a hostile work environment. Pet. App. A7. Blankenship concedes that in such cases an employer is not liable unless it failed to take prompt and appropriate corrective action after having actual or constructive notice of the harassment. Pet. 11-12. It is undisputed that the respondents did not have actual or constructive notice of Blankenship's alleged harassment until she complained to Sullivan on October 3, 1993, and that the

relevant supervisory personnel — all of whom were women — took prompt action in response to Blankenship's complaint. Accordingly, the sole question is whether the particular steps taken in response to Blankenship's complaint were "appropriate" under all the circumstances of this case. After reviewing the record, the lower courts properly found no genuine factual dispute on this point. This conclusion does not implicate any circuit split, and there is no reason for this Court to second guess the lower courts' view of the record.

I.

THIS CASE DOES NOT IMPLICATE ANY CIRCUIT SPLIT.

The federal circuits uniformly have held that employers are not strictly liable for hostile-environment harassment perpetrated by a co-worker without supervisory power over the victim. Instead, under the circumstances of this case, the employer is not liable unless it "failed to implement prompt and appropriate corrective action" after it knew or should have known of the alleged sexual harassment. *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 153 (2d Cir. 1997). This was the standard that Judges Engel and Merritt invoked in their opinions below. *See Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997); *id.* at 875 (Merritt, J., concurring). It also matches the rules used in every other circuit for cases of co-worker sexual harassment. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990); *Andrade v. Mayfair Mgt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996); *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997); *McKenzie v. Illinois Dep't of Transportation*, 92 F.3d 473, 480 (7th Cir. 1996); *Davis v. Tri-State Mack Distributors, Inc.*, 981 F.2d 340, 343 (8th Cir. 1992); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424, 427 (8th Cir. 1984); *Yamaguchi v. Department of the Air Force*, 109 F.3d 1475, 1483 (9th Cir.

1997); *Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167, 171 (10th Cir.), *cert. denied*, 117 S. Ct. 437 (1996); *Kilgore v. Thompson & Brock Mgt., Inc.*, 93 F.3d 752, 753 (11th Cir. 1996).

Blankenship acknowledges this consistency among the federal circuits. Pet. 11. She maintains, however, that the opinions below nonetheless create a circuit split. According to Blankenship,

> the federal courts of appeal have been almost unanimous in holding that, once an employer is on notice of offensive conduct, that employer must take *reasonable* steps to stop the harassment.

Id. By contrast, Blankenship argues that under the opinions below, " 'reasonableness' did not enter into the equation at all." *Id.* at 7. In her view, the Sixth Circuit has now held that even if an employer's response is obviously inadequate under the circumstances, it is "appropriate" as long as it was undertaken in subjective "good faith." *Id.*

The opinions below do not support Blankenship's interpretation. Judge Engel's opinion indicated that an employer will be liable for co-worker sexual harassment "if its response manifests indifference *or unreasonableness* in light of the facts the employer knew or should have known." Pet. App. A9 (emphasis added). While Judge Engel did refer to "good-faith remedial action," he did not say that this was a purely subjective concept. *Cf. United States v. Leon*, 468 U.S. 897, 924 (1984) (discussing "objective good faith"). To the contrary, Judge Engel specifically stated that an employer will be liable for co-worker sexual harassment if its response is sufficiently weak, in light of the known facts, to "indicate an attitude of permissiveness" toward harassment. Pet. App. A10. For instance, regardless of the nursing home's subjective good faith, Judge Engel stated

that if Malcom's harassment of Blankenship had been more severe than it actually was, and if Malcom had not heeded the warning that he received on October 18, then the nursing home "might have been under a duty to prevent Malcom from being near Blankenship" and "might have been under a duty to fire him." *Id.* at A13. Under the undisputed facts of this case, however, Judge Engel concluded that the nursing home's response to Blankenship's allegations "was entirely sufficient to escape liability under the ['prompt and appropriate corrective action'] standard." *Id.* at A9.

Judge Merritt's separate concurrence lends the proper perspective to the isolated snippets that the petition excises from Judge Engel's opinion, which was the opinion of the court only because Judge Merritt joined it. Judge Merritt stressed that he did not understand the majority opinion to immunize all employers who act in subjective "good faith" or who do not intentionally condone sexual harassment. Indeed, he noted that Judge Engel's references to "good faith" (like his own references to "deliberate indifference") were simply "shorthand rhetorical characterization[s]" that did not carry independent legal significance. As Judge Merritt concluded, "whatever label we put upon it — negligence, recklessness, intentional, good faith, bad faith, and so on" — the proper standard is simply whether "the employer knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." 123 F.3d at 875 (Merritt, J., concurring) (quoting *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 50 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 170 (1996)). It is not surprising, then, that district courts within the Sixth Circuit do not appear to share the petition's interpretation of the opinions below. *See Cole v. Knoll, Inc.*, 1997 U.S. Dist. LEXIS 19927 at *52 (W.D. Mich. Oct. 7, 1997).

In sum, the decision under review does not create any split among the circuits. The opinions below apply the same

requirement of "prompt and appropriate corrective action" used elsewhere. The petitioner simply wants this Court to review the application of that well-established requirement to the particular facts of this case.[3]

II.

THE QUESTIONS PURPORTEDLY RAISED BY THE PETITION MAKE NO DIFFERENCE TO THE OUTCOME OF THIS CASE.

Even had the petition correctly interpreted the opinions below, the questions raised by the petition make no difference to this case. Even Judge Ryan — who *concededly* applied the standard favored by the petitioner, *see* Pet. 9 — agreed that "as a matter of law, defendants responded reasonably to plaintiff's allegations of sexual harassment by her coworker." Pet. App. A20.

This conclusion is correct. It is undisputed that upon receiving Blankenship's initial complaint on October 3, the nursing home took immediate action to separate Malcom from Blankenship, to protect Blankenship from further harassment, and to monitor the situation closely. The nursing home also conducted an immediate investigation of Blankenship's

3. Even if one accepted the petition's interpretation of the opinions below, the petition would still fail to demonstrate a circuit split. At most, the petition claims that the Sixth Circuit has been inconsistent about what constitutes "prompt and appropriate corrective action." After all, past Sixth Circuit opinions have stated that employers must respond "adequately" (and not simply in subjective good faith) after receiving actual or constructive notice of sexual harassment. *See, e.g., Wathen v. General Electric Co.*, 115 F.3d 400, 407 (6th Cir. 1997); *Fleenor*, 81 F.3d at 50. If the Sixth Circuit agrees with the petitioner's interpretation of the opinions below, it can readily use the mechanism of *en banc* review to resolve any internal tensions in its precedent.

allegations, but was unable to find any corroborating witnesses. The nursing home nonetheless provided Blankenship with a parking-lot escort and repeatedly checked whether Malcom was causing trouble. After surveying the record, Judge Engel properly concluded that under the circumstances, "there was little else, if anything, [the nursing home] could do." Pet. App. A9. As the District Court agreed, the nursing home's response "must be deemed reasonable under the circumstances." Pet. App. A38.

To be sure, Blankenship maintains that the nursing home's initial response did not stop the harassment. According to Blankenship, Malcom grabbed her breasts approximately one week after her initial complaint, and he asked her for a date on October 12. But only one day after Blankenship submitted her second written complaint (which described the request for a date but omitted the breast-grabbing incident), the nursing home gave Malcom a stern warning and threatened him with termination if he ever again harassed an employee. The nursing home issued this disciplinary warning even though Malcom denied having harassed Blankenship. It is undisputed that after the warning, Blankenship reported no more harassment.

Blankenship suggests that on October 22, the nursing home should nonetheless have promised to take (unspecified) steps to ensure that she did not have contact with Malcom in the future. *See* Pet. 15. This case does not present that issue, because Blankenship did not allege damages stemming from wrongful termination. Because Blankenship's resignation on October 22 must be presumed voluntary, and because Blankenship had no further contact with Malcom after that date, she cannot claim to have suffered any damages from the nursing home's conduct on October 22.

But in any event, the mere fact that Malcom was in Blankenship's vicinity on October 22 did not constitute

misconduct on his part. As Judge Engel noted, "[t]he workplace involved here was relatively intimate" and employees almost inevitably came into contact with each other. Pet. App. A12. In her meeting with the nursing home's all-female management on October 22, Blankenship herself said that Malcom did nothing improper toward her after October 12, when he allegedly had asked her for a date. *See id.* at A5; *see also* C.A. App. 395, 438-40, 580-81. Because Malcom had not been accused of any further untoward conduct after being warned, "there was nothing to merit further censure by [the nursing home]." Pet. App. A12. Given the particular facts of this case — including the nature of Blankenship's allegations against Malcom and the fact that, according to Blankenship's own report, the nursing home's response had been effective in stopping any misconduct — "[p]reventing Malcom from coming near Blankenship was not yet a necessary step." *Id.* at A13; *see also, e.g., Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 718 (3d Cir. 1997) (rejecting "the proposition that it is always illegal for an employer to require a prior victim of sexual harassment to return to work in the company of co-workers responsible for the prior harassment"); *Zirpel v. Toshiba America Information Systems, Inc.*, 111 F.3d 80, 81 (8th Cir. 1997) (affirming summary judgment for employer).

III.

THERE IS NO REASON TO HOLD THE PETITION FOR *FARAGHER V. CITY OF BOCA RATON*, NO. 97-282.

Finally, there is no reason for this Court to hold the petition pending the decision in *Faragher v. City of Boca Raton*, No. 97-282. Indeed, the petition properly refrains from citing *Faragher* at all, because *Faragher* raises entirely different issues.

In *Faragher*, two lifeguards alleged that they had been sexually harassed not by a mere co-worker, but by their

supervisors. Circuits have divided over the extent to which an employer is liable for a hostile work environment created by an employee's supervisor, to whom the employer has delegated power over the employee. This Court therefore granted certiorari to decide whether an employer is "responsible for hostile-environment sexual harassment committed by supervisory employees who use their supervisory status to effect harassment." *Faragher v. City of Boca Raton*, No. 97-282, Petition for Certiorari at i. But this question has no relevance to the present case. As a janitor, Malcom had no "supervisory status"; the nursing home had not given him any supervisory power over Blankenship, and there is no question about whether the nursing home should be liable for the misuse of that power. The present case simply does not raise the question that divided the circuits in *Faragher*. As noted above, when the person responsible for the creation of a hostile work environment is a co-worker rather than a supervisor, every circuit has permitted employers to avoid liability by taking appropriate corrective action.[4]

The *Faragher* case also raises questions about the circumstances in which an employer should be deemed to have constructive knowledge of the alleged harassment, and the Court granted certiorari on that issue too. *Id.* Again, however, that issue

4. The petition incorrectly suggests that the Seventh Circuit recently described the case law in this area as "chaotic" and invited this Court to restore "order." *See* Pet. 18-19 (quoting *Jansen v. Packaging Corporation of America*, 123 F.3d 490, 494-95 (7th Cir. 1997), *petitions for cert. filed* (Nos. 97-569 and 97-799)). The passage quoted by the petition was discussing "the proper standard for evaluating an employer's liability for sexual harassment by a *supervisory* employee." *See Jansen*, 123 F.3d at 494 (emphasis added). By way of contrast, Chief Judge Posner's separate opinion noted the unanimity with which his colleagues approach *co-worker* harassment cases, and explicitly stated that "the cases in which the issue is the employer's liability for harassment by co-workers are the easy ones." *Id.* at 511 (Posner, C.J., concurring and dissenting).

has no relevance to the present case. Here, it was undisputed that Blankenship had put the nursing home on notice of the alleged harassment on October 3, 1993. As the Sixth Circuit explicitly noted, this case did not involve any question of notice, but instead turned entirely on whether the corrective action taken by the nursing home in response to that notice was "appropriate." *See* Pet. App. A8. *Faragher* has no bearing on that question. Accordingly, whatever result the Court reaches in *Faragher* will not affect this case, and there is no reason for the Court to delay disposing of the petition.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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